

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:05-CV-329-GKF-PJC
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA’S BENCH BRIEF REGARDING THE ADMISSIBILITY OF  
DOCUMENTS TO DEMONSTRATE NOTICE AND/OR KNOWLEDGE**

Plaintiff, the State of Oklahoma (“the State”), hereby submits this bench brief to assist the Court with its evidentiary rulings involving the admissibility of documents to demonstrate notice and/or knowledge. As explained below, when admitted for such a purpose, such documents do not constitute hearsay.

**Discussion**

It is well settled that documents introduced for the purpose of demonstrating notice and/or actual or constructive knowledge do not constitute hearsay. The Tenth Circuit Court of Appeals’ decision in *Marsee v. United States Tobacco Co.*, 866 F.2d 319 (10th Cir. 1989), is particularly instructive. In *Marsee*, an administratrix brought a product liability action against a tobacco company arising out of her son’s death allegedly caused by his use of defendant’s snuff tobacco products. *Id.* at 321. The trial court had admitted scientific articles submitted by the *plaintiff* (on the issue of notice) that indicated that snuff posed a health threat to users. *Id.* at 325. After such admission, the *defendant* offered countering scientific articles on the issue of notice. *Id.* The trial court permitted their admission as well. *Id.* On appeal, the plaintiff argued that the trial court erred in admitting defendant’s series of learned articles on the issue of notice because

they constituted hearsay. *Id.* The Tenth Circuit rejected this argument, concluding that

*[t]he hearsay rule is irrelevant in this instance . . . since the articles were not admitted to prove the truth of the matter asserted. Instead, they were admitted on the issue of whether the defendant had notice of the potential dangers its product posed to consumers.*

*Id.* (emphasis added). *Cf. Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1440 (10th Cir. 1992) (affirming admission of evidence of similar incidents to prove notice).

Although the evidence at issue in *Marsee* were learned articles, that is not a distinction that makes any difference. For example, in *Cook v. Navistar International Transportation Corp.*, 940 F.2d 207 (7th Cir. 1991), the Seventh Circuit applied *Marsee* to *industry publications* and found that such publications – offered to demonstrate actual or constructive knowledge of a reasonably competent design engineer – were improperly excluded as hearsay. *Id.* at 212-13. The Court concluded:

It is true, as plaintiff argues on appeal, that the court should not have excluded the evidence in question as hearsay. *The evidence was not offered for the truth of the matter asserted, it was offered to show actual or constructive knowledge and was admissible on that basis.*

*Id.* at 213 (emphasis added).

Numerous other courts have similarly held that documents do not constitute hearsay when relevant to the issue of notice and/or actual or constructive knowledge. *See, e.g., Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991) (“The reports cited by plaintiffs would not be hearsay if they were offered for the purpose of proving something other than the truth of the matters stated therein, such as whether appellees had notice”), *superseded on other grounds*; *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 686 (11th Cir. 1984); *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir. 1969) (concluding that medical articles were not hearsay and were properly admitted to show that defendant reasonably should have known of

existence and nature of particular disease); *Williams v. Muhammad's Holy Temple of Islam, Inc.*, No. 00 CV 1251, 2006 U.S. Dist. LEXIS 7425, at \*19-20 (E.D.N.Y. Feb. 8, 2006) (denying motion *in limine* to exclude third party correspondence under “well-recognized exception to the hearsay rule” where offered to demonstrate notice); *Buttice v. G.D. Searle & Co.*, 938 F. Supp. 561, 565-66 (E.D. Mo. 1996) (concluding that excerpts from medical texts were not hearsay when used to show notice); *LaSalle v. Medco Research, Inc.*, No. 93 C 5381, 93 C 6475, 1996 WL 252474, at \*8, 8 n.11 (N.D. Ill. May 10, 1996) (in securities case, publications – including New York Times, Wall Street Journal, and U.S. Today – deemed not hearsay because they were not offered for the truth of the matter asserted therein, but were instead offered to prove plaintiffs’ actual or constructive knowledge, i.e., to show that a reasonable person would have had serious concerns as to veracity of predictions for drug’s approval); *Huitt v. Market Street Hotel Corp.*, CIV. A. No. 91-1488, 1993 WL 245744, at \*7 n.2 (D. Kan. June 10, 1993) (“The statements that McMichael made to Angle are relevant as to the issue of notice, and thus, are not hearsay.”) (citing *Marsee*, 866 F.2d at 325).

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I hereby certify that on this 19th day of October, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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